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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 630

IDAHO POWER COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

RESPONDENT'S VERSION OF "QUESTION PRESENTED" IS NOT ACCURATE

The statement of "Question Presented" in the brief (p. 2) of Federal Power Commission (F.P.C.) is neither candid, fair nor accurate. A full statement of the questions necessarily involved in and presented by this action is set out in the petition for certiorari (pp. 2-3).

F.P.C. states that the only question is the right of F.P.C. to "impose a condition requiring the licensee

to make surplus transmission capacity of the project's entire transmission system" available for transmitting government power. So stated, the question ignores:

(a) The fact that the F.P.C. order goes far beyond "surplus capacity" and obligates the licensee to increase the capacity of the system, as requested by the Secretary of the Interior, without limit as to time or capacity (Jt. App., pp. 64-65).

(b) Adds numerous other new conditions to the licensee's use and operation of all project lines (Jt. App., pp. 64-68).

(c) The fact that these obligations are imposed on lines (project works) previously licensed and constructed.

(d) And, most importantly, that the impact of the F.P.C. order, and the decision of the Court below, is that a license for specific project works is merely an "open end" license,—subject to unilateral alteration by F.P.C.,—in spite of the specific prohibition of such action by Section 6 of the Federal Power Act.

STATUTES INVOLVED

The basic statute involved herein is Section 6 of the Federal Power Act, 16 U.S.C., Sec. 799:

> "Licenses under sections 792, 793, 795-818, and and 820-823 of this title shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this

> chapter, *which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be* revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be *altered or surrendered only upon mutual agreement between the licensee and the Commission* after thirty days' public notice. Copies of all licenses issued under the provisions of sections 792, 793, 795-818, and 820-823 of this title and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of Title 41. June 10, 1920, c. 285, § 6, 41 Stat. 1067; Aug. 26, 1935, c. 687, Title II, § 204, 49 Stat. 841."

Also, Section 28 of the Act, 16 U.S.C., Sec. 822, set forth in full in the Petition, p. 5.

ARGUMENT

It is of vital importance to all holders of F.P.C. hydroelectric licenses, and to the Commission itself, for this Court to specifically outline the extent of the Commission's power to unilaterally alter existing licenses without mutual agreement between Commission and licensee. Absent such determination, the decision of the Court below will leave the whole question in such a state of confusion that there will be of necessity years of expensive hearings and litigation.

Basic in this case is the realization of the difference between "project" and "project works." It has been well stated in *Lake Ontario etc. Assn.* v. *F.P.C.*, 212 F. 2d 227, 232 (C.A.D.C., 1954), cert. denied 347 U.S. 1015:

> "[2] Petitioners' contentions rest in large part upon the erroneous premise that the Power Commission licenses projects as such. The Federal

> Power Act is not cast in that form. The Commission licenses facilities—dams, powerhouses, transmission lines, and other 'project works' of various sorts—not projects as such. Care must be taken in any consideration of this statute lest an inadvertent shifting of the terms 'project' (which is a whole development) and 'project works' (which are structures) cause confusion."

Here the "project works" were defined by F.P.C. in its original license as to each of the individual units comprising the "project." And, each description of the project works concluded with the phrase "and transmission facilities" (Jt. App., pp. 6-7). There is no question but that the transmission facilities involved herein are transmission facilities required to complete Project 1971 by providing the means for conveying the power and energy generated at the plants to licensee's transmission system for distribution and use.

But it is not necessary for Petitioner to rely on this general description. For each of the previously constructed lines,—separate "project works" under the accepted designation,—*was individually and specifically licensed.* (Oxbow-Brownlee, May 2, 1958, Jt. App., p. 17; Oxbow-Pallette Junction-Divide, March 19, 1959, Jt. App., p. 25; Brownlee-Boise Bench, Dec. 3, 1959, Jt. App., p. 32; and Boise-Brady No. 2, Dec. 14, 1960, Jt. App., p. 37) It is undisputed that such "project works" separately and specifically authorized, constitutes a licensing thereof. *Lake Ontario etc. Assn.* v. *F.P.C., supra; Montana Power Co.* v. *F.P.C.,* 298 F. 2d 335, 340 (C.A.D.C., 1962).

Here the licensee asked for approval of plans for a badly needed additional line required not only for

transmission of the power from the soon to be added third generating unit (the Hells Canyon unit), but also for transmission from existing units which were about to be overloaded (Inman letter to F.P.C., Jt. App., p. 45; Roach telegram, Jt. App., p. 60). This line was a separate "project works," and the action of the Commission in calling it an amendment was erroneous under *Montana Power Co.* v. *F.P.C., supra:*

> "* * * Thus, the additional authority, although called an amendment, was a new and original license for the third unit, within the meaning of Section 4(e) of the Act, and was subject to the requirements of Section 10(e) with respect to the use of the tribal lands."

Confronted with this situation F.P.C. had no power, in issuing this license for new project works, to include therein unilateral material changes in licenses already issued and accepted for other project works (i.e., transmission lines). The Commission's sole function and authority was to determine the need, propriety, feasibility of, and conditions applying to the *new line.* It had no authority to materially alter existing licenses. Section 6 of the Federal Power Act specifically and without ambiguity prohibits this.

And it is important that this Court consider and define the Commission's authority in this respect. For, contrary to F.P.C.'s brief herein, we do have a difference between two courts of appeals. That of the District of Columbia in *Montana Power Co.* v. *F.P.C., supra,* states that authorization of a new project works is a new license, while in this action the Ninth Circuit Court states that it is an amendment and opens all previous parts of the project (even though they are

separately licensed "project works") to unlimited changes, under the guise of conditions.

The vice of F.P.C.'s position herein is that the licensee was compelled to act under coercion, just as great as though a gun were pointed at it. It had waited from September 9, 1963, (Jt. App., p. 39), a period of 10 months, for approval of a line, needed to forestall a regional catastrophe. And then found itself confronted with the proposition that it would be permitted to build this line only if it was willing to agree that its whole project transmission system was to be operated in partnership with the government, not only its surplus capacity *but also* with a requirement for unlimited future construction responsibility to "wheel" government power. The assistance of this Court is required to correct this wrong,—and to prevent other licensees from finding themselves in the same position.

CASES RELIED ON BY COURT BELOW DO NOT SUSTAIN ITS POSITION

Both the Court below and the F.P.C. here rely, erroneously we believe, upon the case of *Montana Power Co.* v. *F.P.C., supra,* as sustaining their position. In the first place, the factual situation was distinctly different. In a previous license F.P.C. had first authorized a three-unit project, then after it had been licensed as a two-unit project, fixed the amount to be paid annually to the Indian tribe on whose lands the project was located. Years later the licensee requested a license for a third unit and the Commission in licensing this unit increased the annual fees to be paid the Indian tribe. It is clear that this increase was due *solely* to the third unit. The Commission

there *did not,* as here, make any changes or alterations as to previously licensed "project works." On the contrary, the Court held, as noted above, that a license amendment for the addition of a third generating unit to an existing licensed project was actually a new and separate license for that unit, as an additional "project works"; that licenses under the Act cover only specific "project works," and not necessarily a complete "project." The two licensed units and other described project works were under a separate and previous license. (See also *Lake Ontario etc. Association* v. *F.P.C.,* 212 F. 2d 227, 232, cert. denied 347 U.S. 1015).

In the *Montana Power* case, the C.A.D.C. said (298 F. 2d 335, at 339):

> "* * * When the petitioner sought authority for a third unit, the Commission granted it by way of further amendment to the original license to show the newly authorized third unit was a project works for an existing project; but it was by no means a part of the project works theretofore licensed. Thus, the additional authority, although called an amendment, was a new and original license for the third unit, within the meaning of Section 4(e) of the Act, * * *"

The Commission, the Court held, was issuing a new license for the third generating unit, and was therefore not altering the previously issued license when it increased the overall annual charge as a result of the added third unit.

The Court below reads the *Montana Power* case as permitting the alteration of separate and previously issued licenses, agreed to and accepted by the licensee, by adding new and additional terms and conditions

relating to previously licensed lines, which were not expressed in those earlier licenses for these lines, and were not agreed to or accepted by the licensee. There is, then, certainly a conflict or material uncertainty as between these two decisions of different courts of appeals. Here, the license order of the Commission effectively altered four previously issued licenses for transmission lines (see Petition, p. 18, footnote; and Respondent's brief in opposition, p. 5, footnote 2), as well as the original project license, by adding thereto new terms and conditions not expressed in any previously issued license, and not agreed to by the licensee by acceptance thereof, as required by Section 6 of the Act to be "expressed in said license."

The Commission stated in its brief in opposition (p. 7), that "The wheeling requirement has not been imposed upon the earlier licenses; it has merely been prescribed as a reasonable condition upon the licensing of the additional facilities."

With due respect, this would seem to be somewhat of a play on words, of the "now you see it, now you don't" variety. Apparently, it is claimed, you don't "impose" the wheeling condition upon the earlier licenses and lines, and therefore the licenses are not "altered"; you merely "prescribe" additional terms and conditions which alter the previous licenses by adding such requirements in a new license for other project works. And thus, Section 6 of the Act is evaded by administrative agency action, and the Act is effectively amended so as to avoid the rights assured under both Sections 6 and 28.

Likewise, the case of *F.P.C.* v. *Idaho Power Company*, 344 U.S. 17 (1952), relied on so strongly by

F.P.C. and the Court below is not controlling here *on the question of the right of F.P.C. to unilaterally alter existing licenses.* As pointed out by Justice Douglas in the opening paragraph of that opinion the F.P.C. licensed the Bliss power plant, and two transmission lines required to transmit its power to licensee's primary transmission system, in *the license.* All that the Commission had previously done was to grant licensee permission to proceed at its own risk. So that as a matter of law, when the actual license was issued, licensee had the option whether to accept it, or refuse and abandon the work already accomplished. But in any event *it did not purport to alter any existing licenses.* And it is not relevant authority on the basic question involved here. It may be emphatically stated that neither *Montana Power Co.* v. *F.P.C., supra,* nor *F.P.C.* v. *Idaho Power Co., supra, the only authorities relied on,* are in point or controlling here.

Petitioner has no quarrel with the decision of this Court in this previous case (*F.P.C.* v. *Idaho Power Co., supra*), but it earnestly urges that the ruling therein is being pushed far beyond any reasonable intention of this Court. And the very apt phrase that F.P.C. is "guardian of the public domain" is being given interpretations far beyond its real meaning. Certainly, as such guardian, F.P.C. does not have unlimited power to impose upon its licensees such ideologies of public v. private power as its members may from time to time entertain. Or permit it to unilaterally alter basic rights specifically spelled out for licensees by precise language in the Act (Sec. 6, Federal Power Act). Or allow a licensee, as to existing facilities, to have imposed upon it a dominant partner.

Here licensee had built and was building generating plants and transmission lines designed to serve the needs of the service area designated in its certificates of convenience and necessity issued by appropriate public bodies. It had the statutory duty to do this. It had planned for this. Its long range financing and its sale of securities were based on this concept.

At any given time there is just so much market for power in this service area. If government power is to usurp licensee's existing facilities and serve some of this market, just to that extent will the licensee be deprived of sales. As stated before, if licensee proceeds with new construction knowing it will have this imposed competition, that is one thing. But to have it imposed *retroactively* upon project works licensed, financed, constructed with no such obligatory partnership is distinctly another.

Here F.P.C. has imposed upon licensee's previously licensed project works an unwelcomed partner,—in fact one that will inevitably be a *managing partner*. The new Article 49 (Jt. App., pp. 64-68) is all encompassing. In addition to admitting the government to use of surplus capacity, the new Article not only limits licensee's right to convert to greater capacity, but *requires* it to convert to greater capacity for government use upon request. The United States is given unlimited right of interconnection, licensee shall not open connecting switches, it must operate in parallel with the government system, licensee cannot recapture for its own use any capacity used by the government in less than 36 months, etc.

In licensing this project the Commission pointed out that tax-free power produced at plants financed by the government's low interest rates will of necessity sell at prices greatly below those that licensee must charge (Jt. App., p. 3). In fact, B.P.A. power sells in licensee's area for *less than the taxes licensee pays.* One does not require a crystal ball to see what will happen to licensee with a managing partner using licensee's facilities to sell a competitive product at a cut rate.

In short, to twist the "guardian of the public domain" theory as has been done here is contrary to the basic theory of the Federal Power Act, which was to encourage private development by assuring 50-year definitive licenses, which could be unalterable bases for planning, building and financing.

Here the effect on public land is minimal. Out of the millions of acres of U.S. owned land in Idaho, the new lines cross 1¾ miles of forest (without any damage, Jt. App., p. 57) and about 25 miles of desert. The so-called "surplus" referred to in F.P.C.'s "Question Presented" (brief, p. 2) is non-existent (Jt. App., pp. 46-47, 60).

We respectfully submit that this Court should look beneath the superficial concept of this action presented by the F.P.C., and consider and determine the basic issues involved.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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